

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE KURIAN JOSEPH

&

THE HONOURABLE MR. JUSTICE HARUN-UL-RASHID

TUESDAY, THE 4TH SEPTEMBER 2007 / 13TH BHADRA 1929

MFA.No. 1031 of 1994(A)

OS.3/1992 of DISTRICT COURT, THRISSUR

.....

APPELLANT:

SARAMMA, D/O.KODEKKADAN JACOB,
AGED 56 YRS., CHETTIPARAMBU DESOM,
MANAVALASSERY VILLAGE, MUKUNDAPURAM TALUK.

BY ADV. SRI.K.G.BALASUBRAMANIAN

RESPONDENTS:

1.KOCHANNAM W/O.KODEKKADAN JACOB, AGED
79 YRS., CHETTIPARAMBU DESOM, MANAVALASSERY VILLAGE,
MUKUNDAPURAM TALUK.

2.JOSE, S/O.KODEKKADAN JACOB, AGED 54 YRS.,
RESIDING AT -DO- -DO-

3.FRANCIS, S/O.KODEKKADAN JACOB, RESIDING AT
-DO-

4.THOMAS, S/O.KODEKKADAN JACOB, AGED 46 YRS.,
RESIDING AT -DO-

5.DANIEL @ DANI, S/O.KODEKKADAN JACOB,
AGED 39 YRS., RESIDING AT -DO-

6.GEORGE, S/O.KODEKKADAN JACOB, AGED 44 YRS.,
-DO-

7.ANIE, D/O.KODEKKADAN JACOB, AGED 32 YRS.,
RESIDING AT -DO-

8.MARIYAMKUTTY, D/O.KODEKKADAN JACOB, AGED 42 YRS.,
RESIDING AT -DO-

9.BABY @ BARBARA, S/O.KODEKKADAN JACOB,
AGED 36 YRS., RESIDING AT -DO-

10.ROBERT, S/O.KODEKKADAN THOMAS, AGED 44 YRS.,
RESIDING AT -DO-

11.VARGHESE, S/O.KODEKKADAN THOMAS, AGED 40 YRS.,
RESIDING AT -DO-

12.ROSSY, D/O.KODEKKADAN THOMAS, AGED 44 YRS.,
RESIDING AT -DO-

13.GEORGE VARGHESE, S/O.KONIKKARA VARGHESE, AGED 34 YRS.,
V.E.S. COLLEGE OF ARTS, SCIENCE AND COMMERCE,
SINDHIA SOCIETY, CHAMBER, BOMBAY-400 071.

14.ANDREWS VARGHESE, S/O.KONIKKARA VARGHESE,
AGED 38 YRS., KONIKKARA HOUSE,
URIYARACHIRA, RAILWAY STATION ROAD,
IRINJALAKKUDA.

15.SEBASTIAN, S/O.KONIKKARA VARGHESE, AGED 49,
URIYARACHIRA, RAILWAY STATION ROAD,
IRINJALAKKUDA.

16.JOHN, S/O.KONIKKARA VARGHESE, URIYARACHIRA,
RAILWAY STATION ROAD, IRINJALAKKUDA.

17.JOS, S/O.PALLELI THOMAS, AGED 41 YRS.,
MURINGAD VADAKKUMMURI VILLAGE, MURINGOOR DESOM,
MUKUNDAPURAM TALUK.

18.JOHNSON, S/O.PALLELI THOMAS, AGED 35 YRS.,
RESIDING AT -DO-

19.DANIEL, S/O.PALLELI THOMAS, AGED 31 YRS.,
RESIDING AT -DO-

20.ROOBY, D/O.PALLELI THOMAS, AGED 28 YRS.,
RESIDING AT -DO-

21.ANEES, D/O.PALLELI THOMAS, AGED ABOUT 24,
RESIDING AT -DO-

22.TOMY, S/O.KONIKKARA VARGHESE, AGED ABOUT 44,
CHETTIPARAMBU DESOM, MANAVALASSERY VILLAGE,
MUKUNDAPURAM TALUK.

23.ROSSY, D/O.KODEKKADAN DEVASSY, AGED ABOUT 73,
IRINJALAKKUDA DESOM, -DO-

24.JOSEPH, S/O.KODEKKADAN LONAPPAN, AGED ABOUT 76 YRS.,
IRINJALAKKUDA DESOM, -DO-

- 25.LOUIS, S/O.KODEKKADAN LONAPPAN, AGED ABOUT 59 YRS.,
RESIDING AT -DO-
- 26.SELINA, D/O.KODEKKADAN LONAPPAN, AGED ABOUT 57 YRS.,
RESIDING AT -DO-
- 27.PAUL, S/O.KONIKKARA VARGHESE, AGED ABOUT 56,
RESIDING AT RAILWAY STATION ROAD, IRINJALAKKUDA.
- 28.SISILY, D/O.KONIKKARA VARGHESE, AGED ABOUT 52,
IRIYARCHIRA, RAILWAY STATION ROAD, IRINJALAKKUDA.
- 29.PAULY, S/O.KONIKKARA VARGHESE, AGED ABOUT 47,
RESIDING AT -DO-
- 30.MERCY, D/O.KONIKKARA VARGHESE, AGED ABOUT 34,
RESIDING AT -DO-
- 31.THOMAS, S/O.PALLELI CHAKKUNNY, AGED ABOUT 76,
VADAKKUMMURI VILLAGE, MURINGOOR DESOM,
MUKUNDAPURAM TALUK.
- 32.CHARLY @ JACOB, AGED 38, S/O.PALLELI THOMAS,
RESIDING AT -DO-
- 33.STEPHEN, S/O.KODEKKADAN THOMAS, AGED 52,
MANAVALASSERY VILLAGE, MUKUNDAPURAM TALUK.
- 34.ALPHONSA, W/O.PALAMATTATHU PAUL, AGED 39,
CHAMAKUNNU DESOM, MANAVALASSERY VILLAGE,
MUKUNDAPURAM TALUK.
- 35.VARGHESE, S/O.MOOKKANATTUKARA CHAKKU,
AGED ABOUT 64, PARAPPOOKKARA VILLAGE,
MUKUNDAPURAM TALUK.

BY ADV. SRI.A.P.CHANDRASEKHARAN (SR.)

THIS MISC. FIRST APPEAL HAVING BEEN FINALLY HEARD
ON 04/09/2007, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

KURIAN JOSEPH & HARUN-UL-RASHID, JJ.

M.F.A.No.1031 of 1994

Dated 4th September, 2007.

J U D G M E N T

Kurian Joseph, J.

This appeal is at the instance of the plaintiff in O.S.No.3/1992 on the file of the District Court, Thrissur. The proceedings for letters of administration was originally instituted as L.A.O.P.No.124/1990 and in view of the contest, the same was converted as O.S.3/1992. The sole question which arose for consideration before the court below is whether Ext.A1 will annexed to the application for letters of administration was genuine or not.

2. According to the plaintiff, the testator Sri.Kochudevassy executed the will on 24.5.1980. Four days thereafter, he died on 28.5.1980. Kochudevassy was bachelor. The plaintiff is the cousin of the testator-daughter of Jacob who is the father's brother of the testator. We find from the judgment that the plaintiff is wrongly described as niece. Since the plaintiff is the testator's father's brother's daughter, she is only a cousin and not niece. The defendants 23 to 30 and 33 to 35 contended that the will is a concocted one. The defendants are also the

relatives-legal heirs of the deceased Kochudevassy. The court below, advertent to the evidence available on record, held that the will is not genuine. Hence the appeal.

3. Sri.K.G.Balasubramanian canvassed for the position that the court below erred in the very approach regarding the alleged suspicious circumstances under which the will is said to have been executed. It is submitted that in the absence of a specific plea regarding suspicious circumstances, the court cannot presume that the will was executed under suspicious circumstances. It was also contended that for the only reason of delay in filing the application for letters of administration, inference against the plaintiff cannot be drawn regarding the genuineness of the will. Still further it is contended that the plaintiff was not given sufficient opportunity before the court below to establish her case.

4. In order to appreciate the contentions taken by the appellant, it is necessary to trace certain events prior to the filing of the application for letters of administration. The plaintiff is the 7th defendant in O.S.408/88 on the file of the Sub Court, Irinjalakkuda, a suit for partition. The plaint schedule property is the disputed property covered by the will. The suit was filed in

1988. The same was preceded by a notice and the plaintiff had duly received the notice. The notice was not responded to. On entering appearance in the partition suit, for 11 months the plaintiff did not have the case of the will. Thus not only that the application for letters of administration is belatedly filed, but there is also no explanation for the delay of around 11 months in filing the application for letters of administration even after entering appearance in the partition suit. It is not as if some of the defendants had not pleaded regarding the suspicious circumstances under which the disputed will is said to have been executed. Their written statement would show that they had a case that the will was a concocted one. The court below has only made an attempt to find out the various circumstances leading to the statement that the will is a concocted one. It is not as if the court below made a wrong approach by presuming that the will was not genuine and the same was executed under suspicious circumstances. The court below made an enquiry as to the circumstances under which the alleged concocted will is said to have been executed. It is only in that process, various circumstances have been referred to by the court below.

5. The plaintiff herself had contradictory versions

regarding her refusal to respond to the lawyer notice issued prior to the institution of the partition suit. It was also rightly noted by the court below that her version regarding the name of the testator was not correct. In all the documents, admittedly, the testator was described as Devassy only. In the disputed will alone, he is described as Kochudevassy. The recitals in Ext.A1 will also would show that various details as to how the property was devolved on him are also given. It is said to have been executed in a healthy state of mind and of his free will. But the evidence of PWs.1 and 2 would show that the testator was in the hospital prior to the execution of the will, and on admitting him in the hospital, he was initially in the intensive care unit. Admittedly, the plaintiff was not the only person who nursed the testator. The brothers of the testator and their children were also nursing him in the hospital. Even in such a serious condition of the testator, according to the attester PW2, at the time of execution of the will, only the attesters and the testator were in the room. As rightly held by the court below, it is highly improbable that the relatives of the testator would leave him alone in the room in such a serious physical condition.

6. There is also a reference to the apparent variation

in the signature of the testator. Though PW1 initially stated that the testator only affixed one signature, it was clarified in the re-examination that three signatures have been affixed. But on a mere look at the signatures in Ext.A1, it is fairly clear that the signatures vary among themselves. Though Sri.Balasubramanian made an attempt to establish that it is because of the feeble state of health of the testator that such a variation occurred, we are afraid the contention cannot be appreciated. The available signatures of Devassy in other documents do not apparently show that they are one and the same.

7. Yet another situation referred to and relied on by the court below regarding the suspicious circumstances under which the will is said to have been executed is the recital regarding the state of affairs with regard to the nursing given to the testator. Though it is stated in Ext.A1 that the plaintiff had been nursing the testator for quite some time, in the evidence she said that the testator was sick only for a few days and at that time, he was admitted in the hospital also. It is stated in Ext.A1 that the testator had been residing permanently in the house of the plaintiff, but according to the plaintiff herself, the testator had been residing in his own house.

8. Sri.Balasubramanian contended that sufficient opportunity was not given to the plaintiff to substantiate her case. The contention cannot be appreciated. The application for letters of administration was filed after ten years of the execution of the will. The same was filed only after 11 months of entering appearance in the partition suit. The partition suit is of 1988 whereas the application for letters of administration was filed only in the year 1990. The judgment under appeal is of 30th May, 1994. The proceedings would reveal that the plaintiff had been given ample opportunity before the court below to substantiate her case. Though an attempt is made before this Court by producing certain documents, we find from those documents also that those tax receipts are issued in the name of Devassy only and no attempt was made by the plaintiff either for change of the name in the records of the Municipality or to effect mutation in the revenue records. In the light of all the circumstances emerging out of the evidence available on records, particularly the contradictory and inconsistent stand taken by the plaintiff herself and the delay in disclosing the existence of the will, we are of the view that the plaintiff has not proved the execution of the will. The circumstances and the evidence available on

records would only weigh against the plaintiff and therefore, the court below rightly dismissed the suit. Thus there is no merit in the appeal. It is dismissed.

KURIAN JOSEPH, JUDGE.

HARUN-UL-RASHID, JUDGE.

tgs

**KURIAN JOSEPH &
HARUN-UL-RASHID, JJ**

M.F.A. NO.1031 OF 1994

J U D G M E N T

Dated 4th September, 2007.